NO. 20893

United States Court of Appeals

NINTH CIRCUIT

MICHELE MARCHESE,

Petitioner-Appellant,

vs.

UNITED STATES OF AMERICA, et al.,

Respondents-Appellees.

JESSE DEL BONO,

Petitioner-Appellant,

vs.

UNITED STATES OF AMERICA, et al.,

Respondents-Appellees.

APPELLANTS' OPENING BRIEF

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STATEMENT OF THE CASE

Appellants were convicted, following jury trial on June 16, 1958, for violation of Title 18, Section 371 and Title 21 of Section 174, United States Code, relating to conspiracy and sale of heroin. On their joint appeal (Case No. 16151) this Court affirmed the judgments of conviction, on April 15, 1959 (264 F. 2nd 892). On June 29, 1959, certiorari was denied by the Supreme Court (360 U.S. 930, 938).

On November 16, 1960, in Case No. 1300-60-T.C. Marchese filed a motion to annul, vacate and set aside his judgment of conviction, under Title 28, Section 2255 U.S.C. Del Bono filed a similar motion on December 9, 1960, in Case No. 1379-60 T.C. Both motions were denied by the Honorable Thurmond Clarke, the same judge who presided at their trial. On February 3, 1961, both appellants filed motions for reconsideration of the orders denying their motions. On March 14, 1961, Del Bono's motion was denied and on March 15, 1961, Marchese's motion was denied.

Inadvertently, both appellees permitted the time for appeal to expire.

On June 20, 1961, Marchese, who was then incarcerated at the Federal Correctional Institution at Terminal Island, filed a petition for writ of habeas corpus in Case No. 801-61-T.C. (Clerk's Transcript pp. 2-47). Appellees filed a return to this petition on June 29, 1961, and on the same day the Honorable Pierson Hall, in the absence of Judge Clarke, denied and dismissed the petition *ex parte* without a hearing. Marchese filed notice of appeal, and in Case No. 17480, this Court, on May 31, 1962, affirmed said order of dismissal (304 F. 2nd 154[1]).

In the meantime, on December 19, 1961, Del Bono, in Case No. 1595-61 T.C. filed a new motion for relief under Title 28 Section 2255 U.S.C., which motion was denied by Judge Clarke on December 27, 1961. Del Bono did not appeal

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[1] The Circuit Court held:

(a) "Petitioner having failed to appeal from the denial of his motion under Section 2255 may not now question either the ruling on that motion, or the validity of his sentence, by use of habeas corpus."

(b) "Petitioner fares no better if his application for writ of habeas corpus is treated as a second motion under Section 2255." The Court held, in effect, that the new grounds urged were based upon decisions of the Supreme Court subsequent to the original motion and that such could not be done. The Court cited *Hill v. United States*, 368 U.S. 424, which quoted from *Sunal v. Large*, 332 U.S. 174, but overlooked one exception set forth in *Sunal*, namely, "where the error does not trench on any constitutional rights of defendants."

(c) "Even if these may be considered new grounds,

Following the aforesaid decision of this Court on May 31, 1962, Marchese filed a petition for certiorari in the Supreme Court. On June 10, 1963, the Supreme Court reversed this Court and the District Court, granted certiorari and remanded the case (374 U.S. 101). Its decision read as follows:

> "*Per Curiam.*
>
> "The petition for writ of certiorari is granted, the judgment vacated and the case remanded to the United States District Court for the Southern District of California for reconsideration in the light of *Sanders v. United States*, 373 U.S. 1." (C.T. p. 63)

Following such reversal and remand, Judge Clarke heard the petition of Marchese for habeas corpus in several sessions terminating on September 30, 1963, at which time he granted the petition. During the proceedings, on July 26, 1963, Marchese filed a Supplemental Memorandum in Support of Petition (C.T. 64-72) and also a Reply to the Supplement filed by respondents to Return to Petition for Writ of Habeas Corpus

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[1 continued] the application fails to set forth the reason why petitioner was previously unable to assert the new grounds, and does not allege that he had previously been unaware of the significance of the relevant facts which is a standard established for consideration of successive motions under 2255. *Sanders v. United States*, 297 F. 2d 735 (9th Cir. 1961)."

It is to be noted that the *Sanders* case upon which the Court relied was reversed by the Supreme Court. 373 U.S. 1

(C.T. 102-110) and Memorandum in Support of Proposed Findings of Fact and Conclusions of Law (C.T. 114-117). On September 30, 1963, Judge Clarke signed the findings, conclusions, and judgment, wherein he adjudged that the petitioner be immediately released from custody. Incidental to such release, and primarily to fortify his order of release, at the request of Russell E. Parsons, the then attorney for Marchese, Judge Clarke reduced the sentence of Marchese from ten years to five years (C.T. 129-130).

On November 12, 1963, Del Bono filed a "Petition to Annul, Vacate and Set Aside or Modify the Judgment of Conviction . . . Pursuant to the Provisions of Title 28, United States Code, Sections 2255 and 2242" (C.T. 211-227). On December 20, 1963, after a hearing, Judge Clarke granted the petition and signed Findings of Fact and Conclusions of Law (C.T. 238-245) and a Judgment based thereon in favor of Del Bono (C.T. 246-247).

On November 27, 1963, fifty-eight days after the judgment was rendered in favor of Marchese, the Government filed a Notice of Appeal, and on February 17, 1964, filed a Notice of Appeal from the judgment in favor of Del Bono.

On February 10, 1965, this Court reversed the judgments

of the District Court (341 F. 2nd 782). Petition for certiorari was denied by the Supreme Court.

Following remand, on November 10, 1965, Marchese filed a "Motion to File Amended Findings of Fact, Conclusions of Law and Judgment, or in the Alternative to Treat Motion as New Supplemental Motion Under Sections 2243 and 2255, Title 28, U.S.C." (C.T. 143-149) and accompanied said motion by filing proposed Amended Findings and Conclusions of Law (C.T. 166-177) and proposed Amended Judgment (C.T. 179-181). On the same day, Del Bono filed a similar motion (C.T. 253-257) and proposed Amended Findings of Fact and Conclusions of Law (C.T. 258-268) and Amended Judgment (C.T. 269-271).

Said motions were argued before Judge Thurmond Clarke in several sessions of hearing.

The argument by Bruce I. Hochman, one of Marchese's attorneys and by Russell E. Parsons, to which reference is made is set forth in Reporter's Transcript of said hearing (65-RT 5-18, 22-24[2]). Judge Clarke, being of the same opinion as attorneys for appellants - that the decision of this Court was "somewhat

[2] When reference is made to the Reporter's Transcript of the trial, the symbol will be "Trial R.T."; reference to the Reporter's Transcript of the hearing in July, August and September of 1963, will be "63-R.T."; reference to the Reporter's Transcript of the last hearing will be "65-R.T."; reference to the Clerk's Transcript is "C.T."

ambiguous" - nevertheless denied the motions and certified the matter to this Court in order to ascertain what powers he had under this Court's last decision (65-R.T. 30, 32, 37, 38, 45-47). Apparently no minute order was made, and since it was discovered later, following the filing of Notices of Appeal, an order was signed by Judge Clarke on April 27, 1966, *nunc pro tunc* as of January 20, 1966, prior to the filing of Notices of Appeal (C.T. 207-209). Amended and Supplemental Notices of Appeal were filed on May 16, 1966, to protect the appeal (C.T. 279-281).

JURISDICTION

The jurisdiction of the District Court was invoked under Sections 2241, 2243, 2255 of Title 28, United States Code. This Court has jurisdiction on the joint appeal of Marchese and Del Bono to review the judgment of the District Court under Sections 1291, 1294, 2253, 2255 of the United States Code.

STATUTES INVOLVED ON APPEAL

Title 28, Sections 2241, 2242, 2243, 2244, 2253, 2255 of United States Code.

United States Constitution:

Article I, Section 9, Clause II

Fourth, Fifth and Sixth Amendments.

STATUTES INVOLVED IN PETITIONS AND MOTIONS

Title 18, Sections 2, 371, and 1403(2) of United States Code.

Title 18, Sections 4161 et seq. of United States Code.

Title 21, Section 174 of United States Code.

Title 26, Section 7257 of United States Code.

Title 28, sections 2243 and 2255 of United States Code.

Fourth, Fifth and Sixth Amendments of United States Constitution.

STATEMENT OF FACTS

The facts in connection with the alleged activities of appellants, the investigation by the Government, the arrests of appellants and the testimony at their trial have been set forth in detail in the petition of Marchese (C.T. 6-11) and in the petition of Del Bono (C.T. 214-219). This Court, in its opinion on the last appeal, also summarized certain facts in Notes 3 and 4. We shall, therefore, set forth here only the facts pertinent to the issues on the appeal and, briefly, also some pertinent facts in our Argument.

Sussman, a narcotics addict, was arrested by Federal narcotics agents on January 30, 1958, for the sale of heroin, and charged with violation of Section 174 of Title 21, U.S.C. At that time he was on five years probation for violation of California's narcotics laws. He was taken to the office of the Narcotics Bureau in Los Angeles and conferred with both Federal and State narcotics agents. He was then made a "special employee" and taken before United States Commissioner Hocke and released "O.R." at the instigation of Agent Richards who was in charge of the investigation. (Trial-R.T. 18, 19, 63; 63-R.T. 9-39). On January 30th, Sussman was equipped by the agents with a Schmidt electronic transmitting device concealed on his person and then sent to Marchese's apartment at

11032 Moorpark Avenue, North Hollywood, California.

Sussman had been a friend of Marchese's for many years. Marchese had assisted him and his family financially on many occasions and had even sent him to Mexico, paying all expenses, in order to cure him of his narcotics addiction. Because of his friendship, Sussman was admitted by Marchese into his apartment. The conversation between Sussman and Marchese was overheard by means of a receiving device by Agent Richards and Los Angeles County Deputy Sheriff Farrington, stationed a block or two away. (Trial-R.T. 20-33) This same procedure was followed on January 31, and February 7, 1958. (Trial-R.T. 43-45, 48-50; 63-R.T. 35-39). At all times Marchese knew nothing of the transmitter concealed upon Sussman's person and knew nothing about Richards' and Farrington's listening in on the conversations. (Trial-R.T. 441-445)

Sussman's testimony was in conflict with that of Richards as to what was said. Sussman also testified that the testimony was recorded and he signed a statement taken from the recording. (Trial-R.T. 425) When demand was made for the production of such recording, Richards denied that there was a recording. Farrington's testimony was also in conflict with that of Richards, and Farrington also testified that he could hear only about 75% of the conversation. (Trial-R.T. 515-516)

Despite the fact that the finger of the agents' investigation was pointed at Marchese and Del Bono at the aforesaid conference and in the surveillance that followed, and despite two alleged deliveries by Del Bono at a service station on January 31st and February 7th, 1958, no warrant of arrest or search warrant was obtained either against Marchese or Del Bono; yet, on March 13, 1958, both were arrested at a considerable distance from the location of the automobile wherein was found a quantity of heroin. The apartment of Marchese was searched also following the officers' forcible entry therein and his arrest.

ISSUES INVOLVED AND SPECIFICATIONS OF ERRORS

1. The use of evidence obtained by means of the electronic transmitting device (known as the Schmidt transmitter) was unlawful and violated the Fourth, Fifth and Sixth Amendments of the United States Constitution.

2. Appellants had the right to raise a substantial constitutional question, even though said question could have been or was litigated on previous proceedings, including the appeal from the judgment of conviction.

3. Any determination made by the court on a motion under Section 2255 of Title 28, U.S.C., or habeas corpus under Section 2243 of Title 28, U.S.C., is not *res judicata*, and the same question may be raised on subsequent petitions or motions under said sections, especially where constitutional rights have been invaded.

4. The United States District Court, following the opinion and remand by the Circuit Court on the last appeal, had the jurisdiction and power to file amended findings of fact and conclusions of law, and an amended judgment based thereon, granting to petitioners the relief sought by them and intended by the District Court, namely, their full and complete discharge.

5. Since the opinion and remand by the Circuit Court aforesaid was ambiguous, the District Court should have resolved the ambiguity in favor of the petitioners and should have granted them the relief of a complete discharge instead of certifying the cases back to the Circuit Court for clarification as to the District Court's power and jurisdiction to determine the matter.

6. Since *res judicata* does not apply to motions under Section 2255 or habeas corpus, the District Court should have

treated the motions made by the petitioners in the alternative as new motions under Sections 2255 and 2243 of Title 28, U.S.C., and granted petitioners full and complete discharge as apparently authorized or permitted by the opinion of the Circuit Court.

7. If the District Court had treated said motions in the alternative as new motions aforesaid, it had the power and jurisdiction to make new findings of fact and conclusions of law and judgment, based upon matters presented at all of the hearings and upon the record of the case, especially with respect to the violation of the petitioners' constitutional rights in connection with the use by the Government of the Schmidt Transmitter.

8. That the findings of the District Court originally made were not clearly erroneous, and that this Court should review and revise its decision with respect to the findings made by the trial court, in the light of long established fundamental principles governing appellate powers and procedure with respect to findings of fact.

ARGUMENT

I

THE USE OF EVIDENCE OBTAINED BY MEANS OF THE ELECTRONIC TRANSMITTING DEVICE (KNOWN AS THE SCHMIDT TRANSMITTER) WAS UNLAWFUL AND VIOLATED THE FOURTH, FIFTH AND SIXTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

The evidence obtained by the use of the Schmidt transmitter was very important to the Government's case and was most prejudicial to appellants. The court, at the trial, admitted such evidence over objection by appellants. At that time the case of *On Lee v. United States*, 343 U.S. 747, a five to four decision, was controlling and it was also controlling when this Court sustained the judgment of conviction, without opinion, in 1959 (264 F. 2nd 892).

On Lee may be distinguished from the instant case in that here the transmission took place in Marchese's private apartment, whereas in *On Lee* the transmission took place in the public portion of On Lee's laundry, where the public was invited and his customers and the public were served, and also on the sidewalks of New York. In *On Lee* even the Solicitor General of the United States recognized the distinction, for he stated in his opening brief, page 29, with reference to Judge Frank's dissenting opinion in the Circuit

Court as follows:

> "The various situations envisaged in the dissenting opinion where mechanical contrivances are used to publish conversation within a private home are unrelated to the present case. As has been observed above, *a private home is not involved; the conversation took place in a place to which the public was invited.*" (Emphasis added.)

Based on this distinction alone, we submit that the use of the hidden transmitter was a violation of Marchese's rights under the Fourth Amendment. Being thus tainted, it could not be used against Del Bono either as to the substantive counts or the conspiracy counts.

However, the *On Lee* case is no longer authority or controlling. The first breach in the *On Lee* decision was made in the case of *Silverman v. United States*, 365 U.S. 505, wherein a "spike mike" was driven into the outer wall of Silverman's apartment, by which, with the use of an electronic device, agents outside the apartment listened in on conversations taking place in the apartment. This was held to be a violation of Silverman's constitutional rights under the Fourth Amendment and the evidence was held inadmissible. In its decision, referring to the case of *Goldman v. United States*, 316 U.S. 129, where a "detectaphone" was used outside the walls of Goldman's apartment, the Court stated in its

concluding paragraph:

> "We find no occasion to re-examine *Goldman* here, but we decline to go beyond it, even by a fraction of an inch."

It was very significant that no such statement was made with respect to the *On Lee* case. In fact, in Note 4 of its opinion, the Court quoted with approval a portion of Judge Jerome Frank's dissenting opinion in the Circuit Court in the *On Lee* case, as to the right of privacy under the Fourth Amendment, as follows:

> "William Pitt's eloquent description of this right has been often quoted. The late Judge Jerome Frank made the point in more contemporary language, 'A man can still control a small part of his environment, his house; he can retreat thence from outsiders, secure in the knowledge that they cannot get at him without disobeying the Constitution. There is still a sizeable bank of liberty - worth protecting from encroachment. A sane, decent, civilized society must provide some such oasis, some shelter from public scrutiny, some insulated enclosure, some enclave, some inviolate place which is a man's castle.' (*United States v. On Lee*, 193 Fed. 2nd 306, 315, 316 [dissenting opinion].)"

The latest expression of the Supreme Court on this point is the case of *Lopez v. United States*, 373 U.S. 426 (May 27, 1963), wherein the Supreme Court indicated *On Lee* was no longer authority. The hidden transmitter failed to work, so

the use thereof was not directly an issue in the case[3]. The opinion of various justices clearly showed that they, as well as the other members of the Court, regarded that the evidence obtained by use of a hidden transmitter was no longer permissible under the Fourth and Fifth Amendments.

Mr. Justice Warren, in concurring with the majority opinion, stated:

> "Since I agree with Mr. Justice Brennan that the *On Lee* case was wrongly decided and should not be revitalized, but base my views on grounds different from those stated in the dissent, I have chosen to concur specially. I also share the opinion of Mr. Justice Brennan that the fantastic advances in the field of electronic communication constitute a grave danger to the privacy of the individual; that indiscriminate use of such devices in law enforcement raises grave constitutional questions under the Fourth and Fifth Amendments."

Mr. Justice Warren also distinguished the *On Lee* case from the *Lopez* case, in that in the former the one on whose

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[3] In the *Lopez* case, a treasury agent called several times upon defendant, investigating the latter's income tax returns. The defendant offered him bribes and, on the last occasion, the agent had concealed on him a recording device and electronic transmitter. The recording device worked but the transmitter did not. The majority felt there was a distinction between the use of a recording device and a transmitter, and permitted the tape recorded conversation to be used to corroborate the agent's testimony. The defendant also knew that the agent was a treasury agent and, knowing such, invited him to his home.

person the device was concealed was an informer and not known to On Lee as a special government agent, whereas in the *Lopez* case the defendant knew he was dealing with a revenue agent of the government.

Mr. Justice Harlan, in his dissenting opinion, joined by Mr. Justice Douglas and Mr. Justice Goldberg, stated with respect to *On Lee* as follows:

> "I believe that the decision was error, in reason and authority, at the time it was decided; that subsequent experience has sapped whatever vitality it may once have had; that it should now be regarded as overruled; that the instant case is rationally indistinguishable; and that, therefore, we should reverse the judgment below.
>
> "The United States, in its brief and oral argument before this Court in the instant case, made little effort to justify the result in *On Lee*, doubtless because it realized that that decision has lost virtually all of its force as authority. Instead, the government seeks to distinguish the instant case. This strategy has succeeded, it appears, with a majority of my Brethren. The Court's refusal to accord more than a passing mention in its opinion to the only decision of this Court - *On Lee* - factually analogous to the case at bar suggests very strongly that some of my colleagues who have joined the Court's opinion today agree with us that *On Lee* should be considered a dead letter."

The *Lopez* case was decided just two weeks before the Supreme Court granted certiorari and reversed this Court in the *Marchese* case, so it is reasonable to assume that

there was a violation of Marchese's constitutional rights by the use of the transmitter.

In the case of *Massiah v. United States*, 374 U.S. 805, a transmitter was hidden in the automobile of the co-defendant of Massiah, and the conversation was listened to by agents through the use of a receiving device. The Supreme Court, following the rule laid down in *Escobedo v. Illinois*, 375 U.S. 902, held that this was a violation of Massiah's constitutional rights under the Sixth Amendment. In view of such holding, the Court stated it was not necessary to pass upon the question whether the use of the transmitter was a violation of Massiah's rights under the Fourth Amendment, which is one of the issues in the instant case; nevertheless, we submit that the *Massiah* and *Escobedo* cases also apply to Marchese. The matter had already passed the investigatory stage and was in the accusatory stage when Sussman was equipped with the transmitting device, and the conversations thus transmitted were clearly a violation of Marchese's constitutional rights, and hence inadmissible under the rules of said cases either against him (Marchese) or his co-defendant Del Bono.

Prior to the filing by Marchese of his successful

petition for certiorari in the Supreme Court wherein it granted certiorari and reversed the case, this Court decided the case of *Todisco v. United States*, 298 F. 2nd 208. In said case, an Internal Revenue agent, after several attempts had been made by defendant to bribe him, was equipped with a transmitting device concealed on his person and conversations between him and the defendant in the latter's office were transmitted and recorded at the point of reception. The tapes were admitted in evidence over objection, to corroborate the agent's testimony. The Court held that there was no violation of the defendant's constitutional rights.

Since that date the *Lopez* case, *supra*, has been decided which distinctly indicates that such a procedure would constitute a violation of the defendant's rights under the Fourth and Fifth Amendments. There has also since been decided the *Massiah* case, *supra*, which supports the contention of appellants that Marchese's constitutional rights under the Sixth Amendment have been invaded. It is highly significant that in the last decision, this Court completely by-passed and evaded these issues and based its decision upon the erroneous ground that Section 2255 cannot take the place of an original appeal or be invoked to relitigate questions which were or should have been raised on direct appeal from the judgment of conviction. (798) We

shall point out the fallacy of such holding in our next point. Apparently this Court agreed with various justices of the Supreme Court expressed in the *Lopez* case, that the *On Lee* case was no longer authority and should be regarded as overruled. It is our understanding that the questions regarding the use of bugging devices and concealed transmitting devices are now before the Supreme Court awaiting its decision in several cases, including *Miller v. United States*, *Black v. United States*, and *Kolod v. United States*. (See also the argument of Bruce Hochman at the hearing [65-R.T. 10] as to other cases.)

Nevertheless, at the present time the controlling rule as expressed in the *Lopez* case is that the use of a transmitting device, as in the instant case, is an infringement and invasion of constitutional rights under the Fourth and Fifth Amendments.

This Court also by-passed the petitioners' contention No. 5 (p. 787) that the arrest of petitioner Marchese without a warrant, the search of Marchese's person and apartment and of the Del Bono automobile without a search warrant violated Marchese's constitutional rights under the Fourth Amendment, leaving this issue also open to the District Court.

The arrest of Marchese, the search of his person and his apartment violated his rights under the Fourth Amendment.

Johnson v. United States,
333 U.S. 10;

Taylor v. United States,
286 U.S. 1

Chapman v. United States
5 L. Ed. 2d 828.

We submit that the violation of Marchese's constitutional rights by the use of evidence obtained by the Schmidt transmitter justified the discharge of Marchese and Del Bono by the District Court. It was unfortunate that Judge Clarke, at the insistence of counsel, in order to fortify his decision to grant the motion under 2255 or the petition for habeas corpus, reduced the sentence and discharged appellants for time served instead of granting absolute discharge "without the trimmings," namely, "for time served." Since his intent was to discharge appellants in any event, the other language should have been disregarded as surplusage and his true intent carried out, without a quibble on words.

II

APPELLANTS HAD THE RIGHT TO RAISE A SUBSTANTIAL CONSTITUTIONAL QUESTION, EVEN THOUGH SAID QUESTION COULD HAVE BEEN OR WAS LITIGATED ON PREVIOUS PROCEEDINGS, INCLUDING THE APPEAL FROM THE JUDGMENT OF CONVICTION.

This Court, in its last opinion in the instant case, stated:

> "Section 2255 cannot take the place of an original appeal. More properly stated, Section 2255 may not be invoked to relitigate questions which were or should have been raised on a direct appeal from a judgment of conviction. *Dodd v. United States*, 321 F. 2d 249 (9th Cir. 1963); *Black v. United States*, 269 F. 2d 28 (9th Cir. 1959)."

By reason of its view above expressed, this Court bypassed the question as to the violation of constitutional rights of appellants arising out of the use of evidence obtained by means of the Schmidt transmitter and the invasion of constitutional rights under the Fourth Amendment through the arrest and search without either type of warrant.

We submit that this Court's ruling aforesaid was wholly erroneous, and is in direct conflict with numerous Supreme Court decisions, especially where constitutional rights are invaded or trenched upon. In so ruling, this Court ignored and disregarded the opposition rule laid down in the following

cases:

Salinger v. Loisel,
265 U.S. 224;

Price v. Johnson,
334 U.S. 266;

Waley v. Johnson,
316 U.S. 101;

Sunal v. Large, supra,
332 U.S. 174;

Foy v. Noia,
372 U.S. 301;

Marchese v. United States, supra,
374 U.S. 101.

Clearly, the *Dodd* and *Black* cases decided by this Court have been overruled, have no persuasive effect, and cannot be relied upon as authority. This Court was reversed in both the *Sanders* and *Marchese* cases upon the rule it thus expressed.

As we have pointed out in Note 1 of this brief, *supra,* this Court, in its 1962 decision, held in effect that since Marchese failed to appeal from the denial of his motion, he could not question the ruling on that motion by use of habeas corpus or a new motion. This Court also held that points raised by Marchese based on subsequent decisions of the Supreme Court could not be considered under either a petition for habeas corpus or a new motion under Section 2255. The Supreme Court, in reversing said decision (374 U.S. 101),

effectively and completely overruled such holdings and views. Since the Supreme Court decision was controlling at the time of the 1965 decision, this Court was in error in persisting in following its own outmoded and discredited view, in conflict with the said Supreme Court decision, as well as with other Supreme Court decisions.

At most, the view of this Court is limited to errors at law occurring in the trial court. It is not applicable to cases where there has been an invasion of constitutional rights. Even the *Sunal* case and that of *Hill v. United States*, 368 U.S. 424, cited by the Court, clearly recognize the exception pertaining to the invasion of constitutional rights. In both of those cases, only errors at law were involved, and there was no invasion of constitutional rights. In the *Sunal* case, Justice Frankfurter, in his dissenting opinion, lists many cases setting forth exception to the rule expressed by this Court, in addition to the one involving constitutional rights.

III

ANY DETERMINATION MADE BY THE COURT ON A MOTION UNDER SECTION 2255 OF TITLE 28, U.S.C., OR HABEAS CORPUS UNDER SECTION 2243 OF TITLE 28, U.S.C., IS NOT *RES JUDICATA*, AND THE SAME QUESTION MAY BE RAISED ON SUBSEQUENT PETITIONS OR MOTIONS UNDER SAID SECTIONS, ESPECIALLY WHERE CONSTITUTIONAL RIGHTS HAVE BEEN INVADED.

It has been repeatedly held that the doctrine of *res judicata* does not apply to habeas corpus or motions under Section 2255.

Sanders v. United States, supra,
373 U.S. 1;

Price v. Johnson, supra,
334 U.S. 266;

Waley v. Johnson, supra,
316 U.S. 101;

Hayman v. United States,
342 U.S. 205;

Heflin v. United States,
358 U.S. 415.

In the *Sanders* case, the Supreme Court stated on page 8:

> "Conventional notions of the finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged. . . . The inapplicability of *res judicata* to habeas corpus, then, is inherent in the very role and function of the writ."

The Court further held that the remedy under the motion procedure of Section 2255 was "exactly commensurate with that which had

previously been available by habeas corpus in the district where the prisoner was confined," and that it was as broad as habeas corpus.

In the *Sanders* case there was no appeal from the judgment of conviction and no appeal from the denial of the first motion under 2255, yet the Supreme Court held that the failure to do so did not preclude defendant from making a second motion. With respect to successive motions under 2255 the Court stated on page 15:

> "The judge is permitted, not compelled to decline to entertain such an application, and then only if he 'is satisfied that the ends of justice will not be served' by inquiring into its merits. . . .
>
> "Controlling weight may be given to a denial of prior application for federal habeas corpus or section 2255 relied only if (1) the same ground presented in the subsequent application was determined adversely to applicant on prior application, (2) the prior determination was on the merits, and (3) the *ends of justice would not be served by reaching the merits of the subsequent application.*
>
> "Even if the same ground was rejected on the merits on a prior application, it is open to the applicant to show that the ends of justice would be served by permitting the redetermination of the ground. Two further points should be noted. First, the foregoing enumeration is not intended to be exhaustive; *the test is 'ends of justice'* and it cannot be finely particularized." (Emphasis added.)

The denial of certiorari by the Supreme Court imports no expression of opinion on the merits of the case and carries no implication whatever regarding the Court's views on the merits of the case which it has declined to review.

United States v. Carver,
261 U.S. 482;

Maryland v. Baltimore,
338 U.S. 912.

We submit, however, that the granting of certiorari in the Marchese case indicates that the Supreme Court agreed with some, if not all of the grounds raised by Marchese in his petition, and that its decision effectively, completely and finally disposed of the Government's and this Court's contentions that appellants are precluded from raising questions of invasion of constitutional rights in the petition of Marchese for habeas corpus and Del Bono's petitions under Section 2255 or in the alternative habeas corpus under Section 2243, Title 28, U.S.C. In precluding and foreclosing such rights, this Court's decision was in conflict with the decision of the Supreme Court and erroneous.

IV

THE UNITED STATES DISTRICT COURT, FOLLOWING THE OPINION AND REMAND BY THE CIRCUIT COURT ON THE LAST APPEAL, HAD THE JURISDICTION AND POWER TO FILE AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW, AND AN AMENDED JUDGMENT BASED THEREON, GRANTING TO PETITIONERS THE RELIEF SOUGHT BY THEM AND INTENDED BY THE DISTRICT COURT, NAMELY, THEIR FULL AND COMPLETE DISCHARGE.

The discussion between the defense and prosecution attorneys and Judge Clark clearly indicated that Judge Clarke intended to vacate the judgment and discharge Marchese and that he modified the sentence from ten years to five only to support his decision that Marchese be discharged[4]. Since such was his intent, this Court should not, by a technical view of the

[4] During the discussion, the following are some of the statements made by counsel and the court:

"THE COURT: Well, Mr. Parsons, I want to ask you a question. I am going to rule with you and I can rule, my thought is, on 2255. He has already been incarcerated for four and a half years . . ."(63-R.T. 74)

"MR. PARSONS: I think you can modify. I must respectfully disagree with Counsel for the Government. 2255 gives you full power. It says so in it. It followed the old English common law version of coram nobis and they merely put it in the statute - where there is a wrong, there is a remedy." (63-R.T. 74)

"THE COURT: Well, what will I do, I will dismiss the matter, using section 2255. I will order the defendant discharged at this time, his having served four years and how many months." (63-R.T. 76)

language used, prevent the carrying out of such intent. Such intent, after remand, can be expressed by the District Court, as required by the Circuit Court, in the filing of amended findings of fact and conclusions of law and an amended judgment vacating the judgment and granting the discharge.

The language of the Circuit Court, in its opinion, certainly authorizes, if it does not require, the District

[4 continued]

"MR. SCHULMAN [Assistant U.S. Attorney]: I do not understand the judgment, Your Honor . . .

"THE COURT: Well, I am dismissing it under 2255.

"MR. SCHULMAN: And you are granting the motion?

"THE COURT: That is right, and I am discharging the defendant now on the theory that he has already served four years and how many months, so many months."

(63-R.T. 77)

"THE COURT: I am doing it under 2255. Then in addition to that I am ordering him discharged, which Mr. Parsons requests, on the theory that he has already served." (63-R.T. 78)

"THE COURT: I said I am granting relief under section 2255. I am setting aside the sentence . . . I am going to vacate the sentence, but I am going to make it contingent on that and modify the sentence from 10 to 5 years. That is what Mr. Parsons advocates. He could be right and I could be wrong." (63-R.T. 127)

"THE COURT: Well, I am ordering both ways. I am ordering 2255 and then as another condition I am modifying the sentence from ten years to five years." (63-R.T. 127)

Court to make new and amended findings of fact and conclusions of law, to render an amended judgment based thereon, and afford relief to appellants within its jurisdiction, power and authority prescribed by this Court under Section 2255[5]. We particularly wish to emphasize the first two bases for reversal given by the Court on page 801, wherein the Court stated:

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[5] The Circuit Court, in its opinion (341 F. 2nd 782), stated in part as follows:

Page 787: "We conclude that the district court order exceeded that court's authority and jurisdiction under 28 U.S.C. Section 2255 in two respects. A. Section 2255 authorizes the district court to do any one of four things: (1) 'vacate and set aside the judgment and discharge the prisoner,' or (2) 'resentence him, or (3) 'grant a new trial', or (4) 'correct the sentence.' None of the first three courses of action was adopted."

Page 788: "If the court's position is sound that error in fact occurred, of a kind that would justify granting of a Section 2255 motion, appellee's sentence should have been entirely vacated and set aside, and the prisoner discharged from any time based on illegal conviction.

"If the court vacates and sets aside the judgment of conviction, then, of course, the prisoner must be discharged or granted a new trial."

Page 794: "We must assume findings will be made on essential facts only, and not on those which are superfluous or immaterial. But we also require, and are entitled to the benefit of clear and explicit findings on any factual issue tried without a jury. 5 Moor 52.06 (3) (4) (5), 52.10

"Those before us are deficient in the respect theretofore pointed out.

"For that reason it is impossible for this court to determine the materiality of the following Findings of Fact, which are urged by petitioner below as error, but upon which no conclusions of law are based primarily:

"VII - With respect to Sussman's narcotic addiction.

"Having determined that the district court erred in one, exceeding its jurisdiction in granting unauthorized relief, two making insufficient findings to permit this court to ascertain upon what its conclusions were based . . ."

In accordance with the requirements of the opinion, appellants moved to file amended findings of fact and conclsuions of law (C.T. 166-177, 258-268) and amended judgments (C.T. 179-181, 269-271) wherein the District Court

[5 continued]

"VIII - With respect to the use of the Schmidt radio receiver.

"IX - With respect to 'overheard telephone conversation.'

"It could be argued that we assume that it is for this reason (i.e., their immateriality) that no causal connection is stated or shown between Findings VII, VIII, and IX, and any Conclusions of Law. If there is no causal connection such Findings should not have been made, and if there was no reliance on such fact findings, explicit reference is likewise required between such findings and any conclusions resting thereon in order to enable this court to compare the conclusions and findings, and the facts found, with the evidence appearing in the record in our search for 'proper findings' to support the ruling."

Page 795: "We can only conclude the findings are not sufficiently clear to permit us to properly evaluate them, and if for no other reason than this, we would be required to reverse the judgment and remand for further findings and conclusions."

Page 801: Having determined that the district court erred in one exceeding its jurisdiction in granting unauthorized relief, two making insufficient findings to permit this court to ascertain upon what its conclusions were based . . . "

would grant the proper relief permitted or required by the opinion. Because of his uncertainty as to what could be done, Judge Clarke denied the motions without prejudice and certified the matter to this Court for clarification.

Where a judgment is reversed and the case remanded due in part to insufficiency of findings of fact and conclusions of law, the District Court must make new findings and conclusions if it can do so without a hearing, or if not it must have such further hearing as may be necessary to make proper findings and conclusions.

Panama Mail S.S. Co. v. Vargas,
281 U.S. 70.

The Ninth Circuit Court has repeatedly held as it did in the instant case, that where the findings and conclusions are insufficient, the case must be reversed and remanded for further findings and conclusions.

United States v. Trubow,
196 F. 2nd 161;

Gillis v. Gillette,
177 F. 2nd 7;

Medigovich v. Pac. Mutual Life Ins. Co., 235 F. 2nd 609.

In this case, the Circuit Court reversed the judgment because it was beyond the power and jurisdiction of the

District Court to grant the relief set forth in the judgment. The latter should be permitted to render the type of judgment that was within its power and jurisdiction and not be deprived or foreclosed of this right due to its error and misconception of the manner of relief it could grant.

In certain cases where there was a reversal of the judgment of conviction, the Government took a position the opposite of its position in the instant case. In the following cases the Government contended that a reversal of the judgment of conviction left the matter open for further proceedings, including a retrial, even though the remand was silent with respect thereto. The Circuit Court upheld the Government's contentions in the following cases.

Kosak v. United States,
54 F. 2nd 72;

Eubanks v. Louisiana,
356 U.S. 584;

United States v. Reina,
172 Fed. Supp. 113;

Hill v. Texas,
316 U.S. 400, 406.

In the instant case we submit that the reversal without an express mandate leaves all matters open except possibly the following:

1. The evidence was insufficient to support a finding that an improper agreement existed between the United States Attorney and the witness Sussman (based entirely on inference).

2. The evidence was insufficient to support a finding that the Assistant United States Attorney suppressed evidence.

3. That the District Court exceeded its authority in granting relief by way of reducing the sentence of petitioners.

The proposed amended findings of fact specifically cover these points.

First, the District Court declares it makes no finding on the issue and contentions of petitioners that Sussman was promised that he would receive a lighter sentence if he cooperated with government agents. (C.T. 169, ll. 9-13; 261, ll. 11-15)

Second, the District Court declares it makes no finding on the issue and contentions of petitioners that the United States Attorney abused the privilege of his office by suppressing and failing to disclose the truth,

and as to whether there was an improper agreement between the Assistant United States Attorney and Sussman. In other words, the District Court left the findings as to such matters to the Circuit Court as expressed in its opinion.

With respect to deficiencies in the findings and conclusions, as delineated by this Court, they are attempted to be corrected by the amended findings and conclusions.

As to No. 3, *supra*, the proposed amended judgment also corrects the asserted defects in the other judgment, by providing a vacation and setting aside of the judgment of conviction and ordering the discharge of petitioners. This is clearly within the power and jurisdiction of the District Court to do so.

V

SINCE THE OPINION AND REMAND BY THE CIRCUIT COURT WAS AMBIGUOUS, THE DISTRICT COURT SHOULD HAVE RESOLVED THE AMBIGUITY IN FAVOR OF PETITIONERS AND SHOULD HAVE GRANTED THEM THE RELIEF OF COMPLETE DISCHARGE INSTEAD OF CERTIFYING THE CASES BACK TO THE CIRCUIT COURT FOR CLARIFICATION AS TO THE DISTRICT COURT'S POWER AND JURISDICTION TO DETERMINE THE MATTER.

We have discussed, *supra*, the violation and invasion of

appellants' constitutional rights under the Amendments to the Constitution. We have also discussed, *supra*, the power and jurisdiction of the District Court to make new findings and conclusions and to correct and amend its judgment to follow the limits under Section 2255 as prescribed by the Circuit Court. Since the mandate of reversal is silent as to future proceedings, it must be considered in connection with the opinion.

Gulf Refining Co. v. United States,
269 U.S. 125;

Bailey v. Henslee, 309 F. 2d 840;

Kosak v. United States, supra,
54 F. 2d 72;

Fed. Home Loan Bank of San Francisco v. Hall, 225 F. 2d 349 (9th Cir.)

It has been held that the Circuit Court has power to construe its mandate whenever it deems it advisable to do so.

Kresge Co. v. Winget etc. Co.,
102 F. 2d 740;

Meredith v. Fair, 306 F. 2d 374.

However, Section 2243 of Title 28, U.S.C., gives the District Court the power "to hear and determine the facts, and dispose of the matter as law and justice require." Both Marchese's and Del Bono's petitions were filed under Section 2243 for habeas corpus and under the motion procedure under

Section 2255, which gives the District Court the power, if it believes there has been a denial or infringement of constitutional rights, so as to render the judgment vulnerable to collateral attack, to "vacate and set the judgment aside and (shall) discharge the prisoner . . . as may appear appropriate."

In its previous findings and conclusions, the trial court did conclude, even though not specifically, that petitioners' constitutional rights under the Fourth and Fifth Amendments had been denied them and so infringed upon as to amount to a denial of due process under the Amendments of the Constitution, and that it would be fair and equitable and just to modify, reduce, and correct the sentence to five years. In the proposed findings and conclusions there are specific findings and conclusions as to such infringement of constitutional rights, and that it would be fair and equitable and would serve the ends of justice to vacate and set aside the judgment of conviction and discharge petitioners.

Habeas corpus and motions under Section 2255 are governed by equitable principles.

Sanders v. United States, supra,
373 U.S. 1;

Foy v. Noia, supra, 372 U.S. 301.

The petitions of appellants were filed under both Section 2243 for habeas corpus and under Section 2255 of Title 28, U.S.C. Under the former section, the District Court clearly had the power to do what law and justice might require under "equitable principles," without the restrictions placed thereon by the Circuit Court.

Since the District Court considered it fair, equitable and serving the ends of justice to grant the petitions in the first hearing, it should have resolved any ambiguity in the Circuit Court's opinion in favor of petitioners and granted the proper relief intended, under new and corrected findings and conclusions.

VI

SINCE *RES JUDICATA* DOES NOT APPLY TO MOTIONS UNDER SECTION 2255 OR HABEAS CORPUS, THE DISTRICT COURT SHOULD HAVE TREATED THE MOTIONS MADE BY PETITIONERS IN THE ALTERNATIVE AS NEW MOTIONS UNDER SECTIONS 2255 AND 2243 OF TITLE 28, U.S.C., AND GRANTED PETITIONERS FULL AND COMPLETE DISCHARGE AS APPARENTLY AUTHORIZED OR PERMITTED BY THE OPINION OF THE CIRCUIT COURT.

The order *nunc pro tunc* provides as follows:

> "In view of the above order certifying these matters to the Circuit Court for clarification, this Court makes no findings

> or conclusions of the merits of the motions of petitioners as new or supplemental motions under Sections 2243 and 2255 Title 28 U.S.C. reserving the determination of such questions following further clarification of its decision, opinion and mandate by the Circuit Court." (C.T. 209)

We have pointed out, *supra*, under Point III, that the doctrine of *res judicata* does not apply to habeas corpus or motions under Section 2255, so we shall not reiterate the same. Because the doctrine of *res judicata* does not apply in this case, we submit that the District Court could and should have treated the motions of appellants in the alternative as new motions, since it was uncertain as to what it could do under the previous petitions by reason of the ambiguity in the Circuit Court opinion. If it had done so, the matter could then have been settled, so that there would be no need to remand the cases back to the District Court for further proceedings, unless, however, the Circuit Court changes its views in accordance with our contentions set forth, *infra*, in this brief and orders the petitioners completely discharged as was originally intended by the District Court.

VII

IF THE DISTRICT COURT HAD TREATED SAID MOTIONS IN THE ALTERNATIVE AS NEW MOTIONS AFORESAID, IT HAD THE POWER AND JURISDICTION TO MAKE NEW FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT, BASED UPON MATTERS PRESENTED AT ALL OF THE HEARINGS AND UPON THE RECORD OF THE CASE, ESPECIALLY WITH RESPECT TO THE VIOLATION OF THE PETITIONERS' CONSTITUTIONAL RIGHTS IN CONNECTION WITH THE USE BY THE GOVERNMENT OF THE SCHMIDT TRANSMITTER.

After a hearing on habeas corpus, either in granting or denying a writ, the trial court should make findings of fact and conclusions of law.

United States etc. v. Chamberlin,
184 F. 2d 404; affirmed
342 U.S. 845.

Tucker v. Howard, 177 F. 2d 494.

Section 2255 of Title 28, U.S.C., provides:

> "Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States Attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto."

In the instant case, notice was given to the United States Attorney and a hearing was had. Although the court reserved its ruling on the alternative motions, it nevertheless could and, we submit, it should have ruled thereon. It could then

have made findings of fact and conclusions of law upon the record of all hearings and trial, and made a determination similar to that made by it at the previous hearing in September and December of 1963. This is especially true for the reason that the Circuit Court failed to pass upon, in their entirety, the issues as to the infringement of appellants' constitutional rights under the Fourth, Fifth and Sixth Amendments by the use of the hidden transmitter and the arrest of Marchese and the search of his person and apartment without a warrant of arrest or search warrant. The Circuit Court thus left said issues open for further proceedings before the District Court, and the latter could have granted a complete discharge of appellants on those grounds alone, independently of any other ground, treating the motions as new or alternative motions.

VIII

THE FINDINGS OF THE DISTRICT COURT ORIGINALLY MADE WERE NOT CLEARLY ERRONEOUS, AND THIS COURT SHOULD REVIEW AND REVISE ITS DECISION WITH RESPECT TO THE FINDINGS MADE BY THE TRIAL COURT, IN THE LIGHT OF LONG ESTABLISHED FUNDAMENTAL PRINCIPLES GOVERNING APPELLATE POWERS AND PROCEDURE WITH RESPECT TO FINDINGS OF FACT.

Before discussing wherein this Court disregarded long

established principles of appellate review, we first wish to state that the Court, on this appeal, may review and revise the views expressed in its opinion and mandate.

In the case of *Perrone v. Pennsylvania RR. Co.*, 143 F. 2d 168, the court held that the "law of the case" was not binding on it and that it would be free to disregard it if, upon reconsideration, it felt its previous conclusions were substantially wrong.

In *Messenger v. Anderson*, 225 U.S. 436, Justice Holmes stated (page 444):

> "In the absence of statute the phrase, law of the case, as applied to the effect of previous orders on the later action of the court rendering them in the same case, merely expresses the practice of courts generally not to reopen what has been decided, not a limit to their powers."

In the case of *General Life Insurance Co. v. Anderson*, 156 F. 2d 615, the court held that there was no doubt but that it had power upon second review to reach a result inconsistent with its first review of the same case. (Citing *Chesapeake & Ohio Ry. Co. v. McKell*, 209 F. 514, 516.)

In the case of *Commercial Bank of Shreveport v. Connolly*, 176 F. 2d 1004, at page 1006, the court stated:

> "The doctrine of the law of the case

> usually raises a disinclination on the part of an appellate court to reexamine its own prior legal pronouncements in a case, but the doctrine does not destroy its power to do so."

Accord: *Seagraves v. Wallace*, 69 F. 2d 163.

Having established that this Court may review and revise its previous decision, let us now proceed to show wherein its opinion should be revised and changed, due, we contend, to its disregard of long established principles of appellate review.

First: It ignored the intent of the trial judge to vacate and set aside the judgment and discharge appellants and, instead, places emphasis upon the judge's reduction of sentence and discharge for time served by appellants (merely as an adjunct to and for the purpose of fortifying his intended action and decision). All intendments are in favor of upholding the judgment of the trial court. (*Wick v. Keshner*, 244 F. 2d 146; *Ellison v. Frank*, 245 F. 2d 837 (9th Cir.).)

In the *Ellison* case the Ninth Circuit Court states (p. 839):

> "As a trier of facts the credibility of witnesses and the weight given their testimony is a matter to be determined by the trial judge, and his findings must be sustained if supported by any substantial evidence."

Second: Even if the findings and conclusions are not complete, if they are sufficient to sustain the judgment the appellate court should affirm the judgment without remanding for more specific findings and conclusions. (*Alger v. United States*, 171 F. 2d 667; *Weber v. McKee*, 215 F. 2d 447.)

The trial court found specifically that the hidden transmitter was used, and concluded in the light of the *Lopez* case and the reversal of the *Marchese* case that the constitutional rights of the petitioners had been infringed. Whether there were other facts supporting the conclusion or not, the above was sufficient to support the judgment.

Third: The trial court and not the appellate court is charged with the duty of weighing the evidence, determining the credibility of the witnesses, determining inferences and making findings of fact. (*Kincade v. Mikles*, 144 F. 2d 784; *Flynn v. United States*, 205 F. 2d 756.)

Here, the trial court had before it the witnesses Agent Malcolm Richards and the prosecutor, the former Assistant United States Attorney, Bruce Bevan. The court could observe their demeanor and determine their credibility and make its decision based upon such determination.

Fourth: The trial court's findings cannot be set aside unless "clearly erroneous" and due regard must be given to the opportunity of the trial court to judge the credibility of the witnesses. (Title 28, U.S.C., Rule 52(a) of Rules of Civil Procedure; *Nishishawa v. Dulles*, 235 F. 2d 135 (9th Cir.).)

As counsel for Del Bono stated at the hearing:

> "If I may say so, I am constantly before the appellate court, and they throw at me every day, 'Why,the jury determined this. Why,the trial court determined this.That is a question of fact. We are not triers of fact, we don't have the facilities.'" (65-R.T. 15)

This Court has consistently upheld findings of the trial court where there is evidence to support them.

Engstrom v. Wiley, 191 F. 2d 684, 686;

Lerner Stores v. Lerner, 161 F. 2d 160;

Coast Metals, Inc. v. Hall, 315 F. 2d 416;

Puget Sound etc. Co. v. O'Reilly, 239 F. 2d 607.

In the *Puget Sound* case the Court, on page 609, stated:

> "It must be borne in mind in connection with this specification of error that regardless of what decision the reviewing court might reach if it were considering the evidence in the first instance, it could not disturb the trial court's finding unless clearly erroneous."

In the case of *Century Indemnity Co. v. Serafine*, 311 F. 2d 676, at page 679, the Court stated:

> "Similarly, the drawing of reasonable inferences from the evidence is a function of the trial court."

Fifth: The trial court may draw inferences favoring either party and, unless "clearly erroneous," the findings and conclusions based thereon will not be disturbed on appeal. (*Walker v. United States*, 180 F. 2d 217; *Flynn v. United States*, *supra*, 205 F. 2d 756; *Weyl-Zuckerman v. Comm. of Int. Rev.*, 232 F. 2d 214 (9th Cir.).)

Sixth: Appellate court cannot substitute its own inferences, even if contrary inferences can be drawn, for those reasonably drawn by the trial court, even though it might disagree with those of the trial court. (*Widney v. United States*, 178 F. 2d 880; *Wunderlich v. United States*, 240 F. 2d 201, Cert. denied 353 U.S. 950.)

Seventh: Appellate court must take the view of the evidence most favorable to the prevailing party below and that party is entitled to all favorable inferences. (*Stacher v. United States*, 248 F. 2d 112 (9th Cir.); *Cashman v. Mason*, 166 F. 2d 693; *United States v. Comstock Extension Mining Co.*, 214 F. 2d 400.)

Eight: Appellate court should adopt a version consonant with the findings, conclusions and judgment of the trial court. (*Elrick Rim Co. v. Reading etc. Co.*, 264 F. 2d (9th Cir.), Cert. denied 360 U.S. 914.)

There is no question but that at the trial Agent Richards testified as follows:

> "Q Was anything ever said by you or anyone in your presence to Mr. Sussman that if he would go to Mr. Marchese's apartment, he would -- and cooperate with you, that he would receive a lighter sentence on the criminal matter then pending?
>
> "A It wasn't said in my presence, if it ever was said." (Trial-R.T. 107)

Richards was present at the conference in the office of the Bureau of Narcotics where Sussman was brought immediately after his arrest. At once following such conference, Sussman became a "special agent" and was released on his own recognizance and was even paid money during the investigation. We shall not go into all the evidence from which the trial court rightly drew a reasonable inference and made a finding that some promise or assurance was made of the type indicating the possibility of Sussman's receiving a lighter sentence. This Court has summarized the testimony of Richards and Bevan at the hearing in Notes 4 and 5 of the opinion, pages 797 and 798, so we will not repeat it.

An examination of the testimony and evidence justified Judge Clarke in drawing an inference from such facts that some assurance, arrangement or promise was given to Sussman whereby he could expect a lighter sentence and some consideration. Why, otherwise, would a narcotics agent go to so much trouble for a man with a narcotics record, culminating in the most extraordinarily light sentence?

In its opinion, this Court stated that there was "no proof" that Sussman was promised "leniency" as such. There was *proof* that Richards promised Sussman he would do certain things which would normally result in a "lighter sentence," if Sussman cooperated. Richards' testimony was clearly equivocal and he may not have used the exact words of promise indicating the possibility of a lighter sentence. The old maxim, "A rose by any other name will smell just as sweet," is applicable in this case. We submit that the trial judge could infer some agreement or understanding between Sussman and Richards whereby a lighter sentence would normally and probably result in the normal course of events.

In *People v. Nitzberg*, 289 N.Y. 523, 47 N.E. 37, the conviction of the defendant was reversed even though the District Attorney made no specific promise that State

witnesses would receive any benefit in consideration of their testimony; they did obtain such benefits in recognition of their help.

If this Court followed the rules of appellate review as above set forth, it would have upheld the findings and conclusions of the District Court. If any finding should be determined "clearly erroneous," in the light of such rules it should have sustained the judgment on other findings, on the theory that all intendments are in favor of the judgment and that it must be sustained and affirmed if at all possible.

The Court also missed completely the purport of the District Court's finding with respect to the time served by petitioners, amounting to approximately four and one-half years each, and their excellent prison records. The Circuit Court stated that "good time" is a matter for prison authorities, not for courts, and there was no substantial evidence to support the finding that they had "good time." A letter, with respect to Marchese, from the prison authorities was introduced in evidence without objection from the Government, indicating Marchese's excellent prison record[6],

[6] A portion of the letter from the United States Department of Justice, Bureau of Prisons Federal Correctional

and Judge Clarke also had information of Del Bono's good prison record. The Government had full and peculiar information and knowledge of such good prison records and it never at any time during the trial or on appeal denied the statements made or the evidence with respect thereto. If there had been the slightest question as to the correctness of the statements that Marchese and Del Bono had excellent prison records, the Government would have disputed the same, since such records were peculiarly within their knowledge, inasmuch as the Government had custody of petitioners and their prison records.

We concede that "good time" is a matter for the prison authorities, and in this case Judge Clarke only found what the prison authorities had already determined. Since the

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[6 continued] Institute, Terminal Island, to Judge Clarke, reads as follows:

> "You asked that this report be brief and therefore I will not cover in detail his adjustment at McNeil Island. Generally I can say that it was satisfactory and he maintained a clear conduct record.
>
> "Marchese appealed to the Director and other members of the staff to be permitted to remain at this institution to facilitate family visiting and to aid in matters pending before your Court. He was assigned to our Cullinary Department and close custody quarters because of the nature of his offense and length of sentence. His adjustment was such that after 7 months he was removed from close custody quarters and is now in a regular

prison authorities had already determined that appellants had good records, the amount of good time credit each was entitled to was merely a matter of calculation under the rules prescribed by Sections 4161 and 4163 of Title 18, U.S.C., so Judge Clarke had the calculated credit for good time in mind when he made the findings and rendered the judgment.

However, if this Court, despite acquiescence of the United States Attorney as to the fact of such good prison records, declares the evidence insufficient, we must again point out that the proceedings herein were based upon equitable principles, permitting the trial court to do what is just, fair, equitable and serving the ends of justice. That being true, Judge Clarke, even with little or insufficient evidence, could consider what he learned of the good

[6 continued]
dormitory. He continues to work in our Cullinary Department and is now classified as a butcher's helper. His work reports since arrival have been consistently above average. His reports since January of this year have been predominantly outstanding. Because of this and his participation in other self-improvement activities he was granted an award of 2 days per month extra good time which became effective February 1, 1961. This was increased to include a monetary award of $10.00 per month for six months, effective April 1, 1962. You may be interested to know that our monetary awards are granted for specifically prescribed periods because of budgetary limitations."

prison records in making his decision to discharge the prisoners. This would be similar to what the trial court may learn through probation reports or even statements of defense and prosecution counsel, in order to decide what sentence it may impose in a given case.

We reiterate that Judge Clarke's intent was to vacate and set aside the sentence and discharge the petitioners. The length of time served by them and their good prison records were considered by him primarily to determine whether it was fair, equitable and serving the ends of justice to discharge them. The words "for time served" were to justify or vindicate somewhat his intent to discharge them.

Even if this Court persists in its view that the evidence was insufficient to sustain findings as to any promise, assurance or agreement between the agents and Sussman, we submit that Judge Clarke could consider what facts surrounded the activities of Agent Richards and the Assistant United States Attorney, in order to do what in his opinion was just, equitable and serving the ends of justice, under both Section 2243 and Section 2255.

CONCLUSION

In conclusion, we respectfully submit:

1. That the constitutional rights of appellants were invaded and violated under the Fourth, Fifth and Sixth Amendments of the Constitution in the use of the Schmidt transmitter.

2. That the constitutional rights of Marchese were infringed upon when he was arrested and his person and apartment searched without an arrest warrant or a search warrant, although the Government had ample opportunity to do so.

3. That the appellants were denied a fair trial and due process by reason of the fact that Agent Richards admittedly promised to do something for Sussman, to secure him consideration, even though Richards may not have promised or guaranteed him "a lighter sentence" in so many words, and yet no mention of any such arrangement was disclosed at the trial.

4. That even if Assistant United States Attorney Bevan was not deemed to have *suppressed* evidence by the form of objection he made, nevertheless, he *failed to disclose*

activities surrounding the obtaining of great and unusual leniency for Sussman.

5. That due to obvious and patent errors in the opinion of this Court, it should review and revise its opinion and mandate.

6. That if this Court determines on review that the trial court could not, even in the interests of justice, reduce the sentences of appellants or discharge them for time served, as has been done in other circuits, it should authorize and direct the District Court to amend its judgment by vacating and setting aside the judgment of conviction and completely discharge appellants, or this Court itself could order the discharge of the appellants without requiring further proceedings in the District Court. By so doing, we submit, it would be just, fair, equitable and serve the ends of justice.

Respectfully submitted,

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Attorneys for Appellant Michele Marchese

RUSSELL E. PARSONS

Attorney for Appellant Jesse Del Bono

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of The United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

_____

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
County of Los Angeles)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Los Angeles, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 215 West Fifth Street, Los Angeles, California 90013, that on September , 1966, I served the within APPELLANTS' OPENING BRIEF (No. 20893) on the following named, by depositing three copies thereof, inclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Los Angeles, California, addressed to said party at the address as follows:

United States Attorney
Sixth Floor, Federal Building
Los Angeles, California

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September , 1966, at Los Angeles, California.

_____
Signature
(D. A. Standefer)

Orig. & 20 copies:
Clerk, U. S. Court of Appeals
For the Ninth Circuit
U. S. Post Office and Court House Bldg.
San Francisco, California 94101

Subscribed and sworn to before me
this day of September, 1966.

_____
Notary Public in and for
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